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In The Supreme Court of the United States

K&K CONSTRUCTION, INC., AND J.F.K. INVESTMENT COMPANY, L.L.C.,
Petitioners,

v.

THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND STATE OF MICHIGAN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR REHEARING

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ARGUMENTS SUPPORTING PETITION FOR REHEARING

I. The Michigan Court of Appeals' Opinion Wholly Contradicts this Court's Opinion in *Penn Central* and Its Progeny Including *Lingle v. Chevron*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d. 876 (2005) Thereby Destroying Forever the *Penn Central* Balancing Test In Michigan As Well As Interim Regulatory Taking Relief Under First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Pursuant to Rule 44, any petition for rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. **(Rule 44)** On April 2, 2007, this Court issued an Order denying the Petitioners, K&K Construction, Inc. and J.F.K. Investment Company, L.L.C.s' ("Petitioners"), Petition for A Writ of Certiorari. The Petitioners now seek this Petition for Rehearing.

Here, the Petitioners' Petition for A Writ of Certiorari was mailed to this Court on January 29, 2007. On January 31, 2007, the United States Court of Federal Claims issued its Opinion in **CCA Associates** v. **United States**, 75 Fed. Cl. 170 (2007). Although not binding, **CCA** again amplifies the existing murkiness in takings law and further confirms the need for this Court to bring clarity to this fundamental constitutional issue. In **CCA**, a

Louisiana partnership owned an apartment complex in Metairie, Louisiana. The **CCA** plaintiff argued that the United States affected a temporary taking of its property without just compensation. The **CCA** plaintiff asserted that the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA" or "Title II") (codified at 12 U.S.C. § 1715 *l* note) and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, 104 Stat. 4249 ("LIHPRHA" or "Title VI") stripped the partnership of its contractual right to prepay its mortgage and exit the low-income housing program.

> "Plaintiff, CCA Associates ("CCA"), is a Louisiana partnership that owns an apartment complex in Metairie, Louisiana. CCA claims that the United States ***172** effected a temporary taking of its property without just compensation in contravention of the Fifth Amendment of the United States Constitution. Specifically, CCA avers that the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA" or "Title II") (codified at 12 U.S.C. § 1715 *l* note) and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, 104 Stat. 4249 ("LIHPRHA" or "Title VI") (codified in scattered sections of Title 12 of the

> U.S.Code, including 12 U.S.C. §§ 4101 to 4124), stripped the partnership of its contractual right to prepay its mortgage and thereby to exit the low-income housing program under which it was operating and begin to operate the apartment complex on a conventional basis." (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 171-172 (2007).)

The **CCA** court started its ruling by stating that the first factor in **Penn Central Transportation Company** v. **New York City**, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), character of the governmental action, requires a reviewing court to consider the purpose and importance of the public interest reflected in the regulatory imposition and balance the liberty interest of the private property owner against the governments need to protect the public interest.

> "In analyzing the first of the *Penn Central* factors, the character of the governmental action, a court **must** "consider the purpose and importance of the public interest reflected in the regulatory imposition[, and] **balance the liberty interest of the private property owner against the [g]overnment's need to protect the public interest through imposition of the restraint**." *Cienega VIII*, 331 F.3d at 1337-38 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (1994))."

(**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

The **CCA** court stated that this analysis focuses on the intended benefits of the governmental action and on whether the burdens imposed are borne disproportionately by relatively few property owners.

> " **This analysis focuses not only on the intended benefits of the governmental action, but also on whether the burdens the action imposed were borne disproportionately by relatively few property owners** *Cienega VIII*, 331 F.3d at 1338-40; *see also Armstrong*, 364 U.S. at 49, 80 S.Ct. 1563; *Cienega IX*, 67 Fed.Cl. at 466."(**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

In support of this statement of the law, the **CCA** court relied in part on this Court's ruling in **Armstrong** *v.* **United States**, 364 U.S. 40, 49, 80 S.Ct 1563, 4 L.Ed.2d 1554 (1960).

In **CCA**, the public benefit was ensuring subsidized housing for poor families.

> "The government argues that the preservation statutes did not have the character of a taking because they promoted **an important governmental objective-ensuring that subsidized housing remained in place for thousands of poor**

> **families**. Def.'s Br. at 46-48. The government also avers that the preservation statutes did not institute improper burden-shifting because they offered owners alternatives such as a HUD-approved sale and financial incentives to remain in the HUD programs. *Id.* at 48-49." (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

The **CCA** plaintiff, however, argued that the preservation statute disproportionately imposed the burden of maintaining low income housing on the **CCA** plaintiff and other owners of subsidized low income housing:

> "**CCA counters that the preservation statutes disproportionately imposed the burden of maintaining low-income housing on CCA** and other owners of subsidized low-income housing. Pl.'s Br. at 38-39." (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

The **CCA** court ruled that the character of the government's action was a temporary taking of a property interest with the government acting in furtherance of a public purpose to benefit those in need of low income housing. However, the **CCA** court ruled that the burden was placed disproportionately on a few private property owners.

"The character of the government's action is that of a taking of a property interest, albeit temporarily.... **Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners.**" (**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).) (Emphasis Added)

* * *

"Congress' objective in passing ELIHPA and LIHPRHA-preserving low-income housing-and method-forcing some owners to keep accepting below-market rents-is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program." ."(**CCA Associates** v. **United States**, 75 Fed. Cl. 170, 188 (2007).)

The ruling in **CCA** provides the requisite legal foresight to guide legal practitioners throughout the country

on the present dubious effectiveness of the Fifth Amendment of the United States Constitution and each state's parroting the same in their respective constitutions offering presently perplexing myriad of interpretations. The **CCA** court focused on the intended benefits of the governmental action and on whether the burdens imposed are borne disproportionately by relatively few property owners.

Here, the Michigan Court of Appeals ruled that the wetland regulation serves an important public interest and is widespread. However, the Michigan Court of Appeals ruled that, **in order to demonstrate a regulatory takings claim**, a plaintiff in Michigan must now prove that the economic impact and the extent to which the regulation has interfered with distinct investment backed expectations are the functional equivalent of an actual physical invasion of the property. This is now the current law in Michigan and it represents the utter destruction of **Penn Central**.

If presented with the facts in **CCA**, the Michigan Court of Appeals would likely have found a public interest being served – housing for poor families – with widespread application and by simple fiat, as in the K&K case, deny Fifth Amendment remedies altogether. The Michigan Court of Appeals would simply rule that the **CCA** plaintiff cannot show that the economic impact and the extent to which the regulation has interfered with distinct investment backed expectations are the functional equivalent of a physical invasion as a matter of law, ipso facto. Herein is the problem and the birth of a hydra headed fictionalized

concept, Average Reciprocity of Advantage, forever destroying the realistic application of the Fifth Amendment which has no reciprocity, in fact, to the individual burdened with the *widespread* public good. Because there was no physical invasion in **CCA** and nothing rising to the functional equivalent of a physical invasion, the Michigan Court of Appeals would now -- without any balancing at all -- reject any taking, including any **Penn Central** analysis in the stroke of a pen.

The Michigan Court of Appeals and the **CCA** court both start by applying the **Penn Central** balancing test with its attendant progeny. However, the results are just the opposite. This divergence demonstrates how unsettled this area of takings law is and serves as a clarion call to this Court to offer firm resolution and breathe legal life back into the Fifth Amendment.

The Petitioners here have suffered a uniquely felt multi-million dollar loss which is not offset by any benefits flowing from the preservation of other wetlands. Here, the Petitioners have investment backed expectations that are clearly frustrated by the regulation. Here, the denial of the right to develop parcel 1 frustrated recoupment of investment in the entire parcel by denying any return to the Petitioners and by the Michigan DNR never issuing any valid permit until 12 years later, without defining or delineating the wetlands, effectively denied use of the uplands as well.

The frustration of the investment backed expectation and the uncontroverted practical total

diminution in the value of the land clearly demonstrate a taking. The Michigan Court of Claims came to the right ruling and the Michigan Court of Appeals erred when it reversed by irreverently sounding forever the death knell to the **Penn Central** balancing test and the efficacy of the Fifth Amendment in Michigan.[1]

CONCLUSION

The Michigan Court of Appeals' edict of its own Average Reciprocity of Advantage has effectively eliminated a rational context for any and all empirical analysis of the character of government action prong of the **Penn Central** balancing test destroying any and all remedies under the Fifth Amendment by the individual who bears the brunt of public good on his or her shoulders. The Michigan Court of Appeals improperly analogizes wetlands regulations to general zoning in a syllogistically flawed way. While zoning regulations may apply to everyone in the area zoned, wetlands are functions of nature and are not distributed in such a way to syllogistically assure equal burden among landowners. Here, the Petitioners are singled out in the most onerous way to bear the burden

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[1] As this Court ruled in **First English** with regard to the Fifth Amendment :

> "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. (**First English**, 482 U.S. at p. 314.)

alone of providing public good benefits to the public at large. An unconscionable burden the Fifth Amendment was intended to assuage.

For the reasons stated above, the Petitioners respectfully request that this Court grant the Petition for Rehearing and grant Petitioners their previously submitted Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATION UNDER RULE 44

Attorney Robert L. Bunting certifies that pursuant to Rule 44, the grounds for this Petition for Rehearing are restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the Petition for Writ of Certiorari and that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

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